DOL LASIM

v.

PUBLIC PROSECUTOR & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL APPLICATION NO. 24 & NO. 25 OF 1985]
28 JUNE 1986

CRIMINAL LAW AND PROCEDURE: *Applications for leave to refer several questions under s. 66(1) of Courts of Judicature Act 1964 - Leave granted on one question of law which the Court considered to be of public interest - Whether the High Court can call for a demonstration by a chemist and if so whether the High Court can disregard the result and or effect of the demonstration in its judgment - Effect.*

The applicants applied for leave to refer several questions under s. 66(1) of the Courts of Judicature Act 1964. After hearing the parties the Court granted leave on one question of law which it considered to be of public interest which had arisen in the course of the appeal in the High Court.

The question reads:

> In the appeal against acquittal from the decision of the Subordinate Court to the High Court can the High Court call for a demonstration by a chemist and if so whether the High Court can disregard the result and or effect of the demonstration in its judgment.

On 22 November 1979 in Sessions Court, Kelang, two charges were preferred against the two applicants for offences under s. 4(a) and punishable under s. 4 of the Prevention of Corruption Act 1961, for allegedly accepting RM100 from one Mak Chen for giving a favourable report in respect of a traffic accident. Both applicants were acquitted and discharged on the 1st charge. The 2nd charge was amended by the substitution of the words "sketch plan and map" for the words 'favourable report". Both applicants were called to enter their defence on the 2nd charge. Eventually the learned President acquitted and discharged them on the 2nd charge. The prosecution appealed to the High Court against the acquittal.

The learned Judge, during the course of the hearing, asked the prosecution to arrange for the chemist to give a demonstration on the use of anthracene powder. He found both applicants guilty on the 2nd charge, and sentenced each applicant to a day's imprisonment and a fine of RM1,000 in default a month's imprisonment. The applicants appealed to the Supreme Court.

Held:

[1] Regarding the question under reference, the Court was of the view that the answer to the first part is in the negative and there is no necessity to give an answer to the second part of the question.

[2] Additional evidence to be taken must be necessary and in proper form. In view of the fact that the learned Judge came to his conclusion as a result of the demonstration given by the chemist, the Court cannot say he was not influenced by this additional evidence which

was not shown to be necessary and also improperly admitted. A Judge cannot simply call for additional evidence just to satisfy his curiosity or doubt or to supplement a gap in the prosecution. Also, such evidence, if necessary, must be in proper form and taken in accordance with the provisions of the Criminal Procedure Code.

[Conviction and sentence set aside. Acquittal and discharge of the two applicants by the learned President on the 2nd charge restored.]

Cases referred to:
Ramli bin Kechik v. Public Prosecutor [1986] CLJ (Rep) 243
Mohamed bin Jamal v. Public Prosecutor [1964] 30 MLJ 254
R.v. Parks [1961] 3 All ER 633, 634; [1961] 1 WLR 1484
Yue Sang Cheong Sdn. Bhd. v. Public Prosecutor [1973] 2 MLJ 77
Lim Kheak Teong v. Public Prosecutor [1985] 1 MLJ 38
Mat v. Public Prosecutor [1963] MLJ 263
Nadarasa v. Public Prosecutor [1972] 2 MLJ 47
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49

Legislation referred to:
Court of Judicature Act 1964, s. 66(1)
Criminal Procedure Code ss. 196, 425, 317, (i)
Prevention of Corruption Act 1961, ss. 4, (a)

For the applicant (in application No. 24/85) - Christopher Fernando; M/s. Gunaratnam & Co.
For the applicant (in application No. 25/85) - V. Balasingam; M/s. Joseph & Son
For the respondent/public prosecutor - Gooi Soon Seng, DPP

JUDGMENT

Lee Hun Hoe CJ (Borneo):

The applicants applied for leave to refer several questions under s. 66(1) of the Courts of Judicature Act 1964. After hearing the parties we granted leave on one question of law which we considered to be of public interest which had arisen in the course of the appeal in the High Court. The question reads:

> In the appeal against acquittal from the decision of the Subordinate Court to the High Court can the High Court call for a demonstration by a chemist and if so whether the High Court can disregard the result and or effect of the demonstration in its judgment.

It is necessary to set out briefly the facts. On 22 November 1979 in the Sessions Court, Kelang, two charges were preferred against the two applicants for offences under s. 4(a) and punishable under s. 4 of the Prevention of Corruption Act 1961. Under each charge they were alleged to have accepted RM100 from Mak Chen as an inducement for doing an act, that is, by giving a favourable report in respect of a traffic accident. At the close of the prosecution case the 2nd charge was amended by the substitution of the words 'sketch plan and map" for the words "favourable report". Both applicants were acquitted and discharged on the 1st charge. But they were called to enter their defence on the 2nd charge. The learned President made clear that he did so because of the presumption under s. 14 of the said Act. Eventually, he acquitted and discharged them on the 2 charges. In his judgment he did not make clear whether the presumption had been rebutted or not. The prosecution appealed against the acquittal.

Before the learned Judge the prosecution managed to convince him that the learned President was wrong in acquitting the two applicants for two reasons. First, the learned President held that PW1 never asked for the sketch plan and map when there was in fact clear evidence

that PW1 did ask for the sketch plan and map which was corroborated by PW3. Secondly, the learned President had not made any finding whether the defence had rebutted the presumption. These were the two matters which had created the doubt in his mind. If he had not concluded wrongly on the two matters there would be no doubt in his mind. In such a situation the learned Judge could either revert the case back to the learned President to make his finding and touch on the explanation of the two applicants or to order a retrial. Unfortunately, the learned President had left the service. Also, this case was heard *de novo* on three occasions and had been going round the Courts for more than ten years. This is a sad reflection on the administration of justice and should not be allowed to be repeated. The learned Judge, in trying to salvage the wreckage, decided to review the evidence and come to a conclusion. But, before doing so he asked the Prosecution to arrange for the chemist to give a demonstration on the use of anthracene powder. At p. 296 of the Appeal Record the learned Judge made the following notes:

> (Chemist demonstrates to the Court the effect of anthracene powder on documents and its effectiveness in contaminating material or the human body which comes into contact with it. Demonstration reveals that the powder does not stick on a smooth surface, like the cover of a book; it can be wiped off.)

This demonstration has clearly influenced his approach to the case. The applicants said the learned Judge did not touch on this in his judgment. There is no necessity for him to do so as he had expressed himself on this. For on the same page of the Appeal Record he stated that:

> After having seen the demonstration, I feel that I must now view the case somewhat differently. I thought I could give my decision today but now there has to be some rethinking ...

Consequently, he found both applicants guilty on the 2nd charge. In view of the exceptional circumstances of the case he sentenced each applicant to a day's imprisonment and a fine of RM1,000 in default a month's imprisonment.

The applicants conceded that the learned Judge had power to call for fresh evidence. He could do this under s. 425 of the Criminal Procedure Code which had been dealt with in *Ramli bin Kechik v. Public Prosecutor* [1986] CLJ (Rep) 243. In that case the Court had to deal with the question whether the trial Judge had erred in law in entertaining the application under s. 425 of the Criminal Procedure Code of the Deputy Public Prosecutor during the course of the prosecution case to send nine exhibits found in the possession of the appellant to the Chemistry Department for further examination and the calling of fresh evidence on the said exhibits. The Court held the learned Judge had acted judiciously in allowing the exhibits to be sent for further examination by the Chemistry Department. It further held that the learned Judge had a discretion to admit evidence to determine once and for all the true nature of the opium found in the possession of the appellants.

On the other hand, the prosecution contended that in this case the proper provision was s. 317 of the Criminal Procedure Code. It is only in the most exceptional circumstances and subject to exceptional circumstances that the appellate Court is ever willing to listen to additional evidence. In *Mohamed bin Jamal v. Public Prosecutor* [1964] 30 MLJ 254 the Federal Court referred to *R. v. Parks* [1961] 3 All ER 633, 634; [1961] 1 WLR 1484 where Lord Parker CJ stated that the exceptional conditions were (i) the evidence that is sought to call must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be evidence which is credible evidence in the sense that it is well capable of belief; (iv) the Court will after considering

that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence has been given together with the other evidence at the trial.

The prosecution submitted that the learned Judge should not call for a demonstration and conceded that the procedure adopted was not proper. At the time the parties were not concerned about procedure. The additional evidence of the chemist must comply with the provisions of the Criminal Procedure Code. There is nothing to show that the chemist had been affirmed or on oath when he gave the demonstration. There is also nothing to show whether the parties were given the opportunity to examine the chemist. However, it is the submission of the prosecution that independent of the demonstration the learned Judge has come to the right decision. There has been no miscarriage of justice. The applicants stated that the learned Judge should not call for additional evidence if he wanted to convict on other evidence. *Yue Sang Cheong Sdn. Bhd. v. Public Prosecutor* [1973] 2 MLJ 77 and *Lim Kheak Teong v. Public Prosecutor* [1985] 1 MLJ 38 were cited in support. They urged the Court to restore the order of the Sessions Court.

It is not really very important under which provision of the Criminal Procedure Code the learned Judge purported to exercise his power to call additional evidence. But, it should be pointed out that s. 317 comes under Chapter XXX dealing with appeals to the High Court. Further, s. 317(i) opens with the words "In dealing with any appeal under this Chapter" then it goes on to state that "a Judge, if he thinks additional evidence to be necessary, may either take such evidence himself or direct it to be taken by a Magistrate." We are inclined to agree with the prosecution that s. 317 is the provision properly applicable.

Going back to the question under reference we are of the view in this particular case that the answer to the first part is in the negative and there is no necessity to give an answer to the second part of the question. Additional evidence to be taken must be necessary and in proper form.

It is the paramount duty of the Court to see that, in the last resort, justice is done and any miscarriage of justice rectified. In view of the fact that the learned Judge came to his conclusion as a result of the demonstration given by the chemist we cannot say he was not influenced by this additional evidence which was not shown to be necessary and also improperly admitted. A Judge cannot simply call for additional evidence just to satisfy his curiosity or doubt or to supplement a gap in the prosecution. Also, such evidence, if necessary, must be in proper form and taken in accordance with the provisions of the Criminal Procedure Code.

We do not expect a Magistrate or a President to write a thesis. In this case the learned President has given a wrong impression on certain facts. He was aware of the amendment to the 2nd charge. He was clearly satisfied that the prosecution had not proved the guilt of the applicants beyond reasonable doubt. He therefore concluded his judgment at p. 230 of the Appeal Record as follows:

> I therefore found that both Accused person had rebutted the case for the Prosecution. I acquitted and discharged both Accused person on the second charge.

The learned President may not have written a very sound judgment. But in acquitting the applicants it must be assumed that he had accepted their explanation however incredulous it may be. As Hashim Yeop A. Sani SCJ pointed out in *Lim Kheok Teong v. Public Prosecutor* whether given the facts as stated in the Appeal Record could it be said that there was a misdirection. He referrd to what Suffin J, as he then was, said in *Mat v. Public Prosecutor* [1963] MLJ 263 as under:

> The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit.

In the same view, Abdul Hamid J, as he then was, in *Nadarasa v. Public Prosecutor* [1972] 2 MLJ 47 stated:

> To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

Furthermore, an appellate Court should be slow to substitute its own view of the facts for that of the trial Judge. The words of Lord Diplock in *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49 & 50 are loud and clear and read:

> ... An appellate Court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial Judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

We would set aside the conviction and sentence and restore the order of acquittal and discharge of the learned President on the 2nd charge in respect of the two applicants.

Also found at [1986] 2 CLJ 197